

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

Current Electric

Employer

and

Case No. 8-RC-16813

**International Brotherhood of Electrical Workers
Local No. 38**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.¹

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.²

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees performing electrical work, including foremen, journeymen, apprentices, and truckdriver/warehousemen, but excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

The record indicates that there are approximately 7 employees in the unit found appropriate.

¹ The petition was supported by the requisite showing of interest. During the hearing in this matter, the Employer requested that I check the showing of interest against the unit found appropriate. I decline to do so. The Board has held that, "the purpose of the showing of interest requirement is to save the time and needless expense of conducting an election where there is insufficient employee interest in the representation issue; it is not intended to determine if the employees ultimately desire representation, which is the purpose of the election." **The Pike Company**, 314 NLRB 691 (1994); **S. H. Kress & Co.**, 137 NLRB 1244 (1962).

² The Employer and Petitioner filed post-hearing briefs that have been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I. Issues

The Petitioner seeks a unit limited to electrical workers and would exclude truckdriver/warehouseman Timothy Golding, from the petitioned-for unit on the basis that he does not share a community of interest with the electrical workers working in the field. However, the Petitioner would include laid off electrical workers, Tony Freda, Kevin McCartney, Luis Nieves, Louis Nemeth, and David Fulgenzi. Though these employees are laid off, the Union posits that they have a reasonable expectancy of recall and are therefore eligible to vote.

The Employer would include the truckdriver/warehouseman as it contends that job classification does share a community of interest with the electrical workers. With regard to the laid off employees, the Employer takes the position that the laid off employees named above have no reasonable expectancy of recall.

The parties have stipulated that the following electrical workers are eligible to vote: Ken Bernard, Steve Eevanoski, Michael Ferron, Patrick Ferron, Timothy Ferron and Stacy Perez, notwithstanding that certain of these employees are currently laid off.

The Petitioner has agreed to proceed to an election in any alternate unit that I might find to be appropriate.

II. Decision Summary

I find that the truckdriver/warehousemen should be included in the unit. I further find that the laid off employees at issue should be excluded from the unit as they have no reasonable expectancy of recall.

III. Background

Kenneth Schreiber is the owner of Current Electric (the Employer). He has owned the business for forty-two years. The company is involved in commercial electrical and small industrial electrical work.

The employee complement consists of employees performing electrical work and one truckdriver/warehousemen, owner Kenneth Schreiber and Estimator/Project Manager Tom Dodge. Schreiber and Dodge supervise all employees.

All employees work on a day shift commencing between 7:00 a.m. and 7:30 a.m. and ending between 3:00 p.m. and 3:30 p.m. All employees are covered by the same policies, and benefit structure and enjoy the same vacation structure and holidays.

IV. The Issues

A. Truckdriver Timothy Golding

Timothy Charles Golding has been employed by the Employer as its sole truckdriver/warehouseman for thirteen years.

Golding is responsible for stocking, organizing and maintaining the Employer's warehouse and supplies. He pulls materials and delivers them to electrical employees working in the field. When materials that are required for a job are not available in the warehouse, Golding obtains them and delivers them to the jobsites. Golding normally gets orders for particular jobs from supervision. On other occasions, electrical employees call from the field and ask Golding for materials. Golding visits the jobsites with materials on a regular, albeit varied basis. He has contact with electrical workers on a daily basis.

At the jobsites, Golding unloads materials for the electrical workers. Electrical workers assist Golding with this task. Conversely, Golding will assist the employees performing electrical work. The evidence establishes that he has assisted in pulling wires, working with fixtures, and installing pipe and meter bases. Golding does not perform substantive electrical work at the jobsites, but does assist the electrical employees in the performance of their jobs on an as-needed basis.

Golding has no special license or credentials to perform electrical work. However, the employees performing electrical work have varying degrees of skill, training and knowledge and the Employer has no established pre-requisites for hire which it applies to these employees. The record establishes that Golding receives a lower hourly wage.

Analysis.

The appropriate test for reaching a determination on Golding's inclusion is whether he shares a *community of interest* with the employees' in the petitioned for unit. In **Publix Super Markets, Inc.**, 343 NLRB No. 109 (2004), the Board reiterated the factors to be considered:

. . . In determining whether unit employees possess a separate community of interest, the Board examines such factors as: (1) functional integration; (2) frequency of contact with other employees; (3) interchange with other employees; (4) degree of skill and common functions; (5) commonality of wages, hours and other working conditions; and (5) shared supervision. See **Ore-Ida Foods**, 313 NLRB 1016 (1994).

Applying those factors to Golding, I note that his job is functionally integrated with that of the electrical workers. He provides assistance and support to the employees performing electrical work in the field. Golding is regularly and frequently in contact with the employees working in the field. While Golding does not possess any special licensing or training in the electrical work performed in the field, not all of those employees are equally trained or skilled. Golding is covered by the same benefits, vacation and holidays and other terms and conditions of employment. He works the same hours under the same supervision as electrical employees.

With regard to any disparities, Golding's wage rate is lower than the wage rates enjoyed or available to electrical workers. Unlike electrical workers, Golding reports to the Employer's facility on a daily basis as his primary responsibility lies in stocking, organizing and maintaining the Employer's warehouse. I find that these disparities are insufficient to overcome a finding that Golding shares a community of interest with the other employees.

Finally, I note that Golding is the only other hourly employee. Were I to exclude Golding from the unit, he would be left with no opportunity for representation. He cannot by himself, constitute an appropriate unit. See Air Metals, Inc., 83 NLRB 945 (1949).

Based on the record as a whole, and for the reasons stated above, I find the driver/warehousemen classification should be included in the unit.

B. Laid off employees

Employer Owner Kenneth Schreiber testified regarding the Employer's operations. As noted, he founded the company 42 years ago. His normal employee complement ranges from six to eight employees. The Employer enjoys average annual sales in the amount of \$850,000 to \$1,000,000. In 2005, the Employer enjoyed a higher volume of business with sales at approximately 1.4 million dollars. The Employer provided evidence which revealed that its volume of sales in 2005 far exceeded the prior nine to ten years.³ The employee complement was increased to approximately twelve employees to handle the additional work, most of which was completed in the first part of 2006.⁴

With the exception of one current, intermittent job, the Employer has no contracts for work.⁵ The Employer has approximately six jobs out for bid. The value of the jobs is estimated at \$150,000 to \$200,000. The Employer takes the position that even if it were awarded the outstanding bids, the work would not be sufficient to support more than his "core" employees, that being the average complement of six to seven employees.

The Employer has no layoff policy, per se. Employer witnesses including Schreiber and Tom Dodge, testified that the company has laid off employees in the past and recalled those employees. The company has also laid off employees, including John Schwartz, Allen Dye, Matt Weaver, and Dean Marino, who were not recalled. Schreiber concedes that he tries to

³ The Employer provided summary documents, including a bar graph comparing sales data over a ten year period. The document was prepared by the Employer's accountants based on documents filed with the IRS.

⁴ Tom Dodge who serves as the Employer's Estimator or Project Manager testified and corroborated Schreiber with regard to the state of the Employer's enterprise, past and present.

⁵ The job at Broadview Multi-care is intermittent, as the Employer cannot perform the work until completion of asbestos removal. When asbestos removal is complete in an area of the facility, the Employer is able to perform its work. The Employer then waits until the next section of the building has been cleared of asbestos before it can go back to the site. The work will continue on this intermittent basis throughout the year.

recall employees, but that he does not always do so. He concedes that certain of the employees in issue have been laid off and recalled in the past.

On or about February 22, 2006, the Employer laid off employees Tony Freda, Dave Fulgenzi, Luis Nieves and Louis Nemeth for lack of work.⁶ Schreiber effectuated the layoffs and advised effected employees there was no available work. He did not tell the employees whether the layoff was permanent or temporary. After the layoff, the employees periodically called Schreiber to inquire about available work. Undisputed record testimony revealed that at no time were any of the employees advised that there would be work in the future, foreseeable or otherwise. In addition, there is no dispute that on prior occasions, Schreiber has advised employees on layoff that there was anticipated work.

There is some dispute as to when Schreiber advised employees that they should consider other job opportunities. Schreiber testified that while he did not immediately tell the laid off employees that the layoff was permanent, he did so well before the instant proceeding. Witnesses presented by the Petitioner testified that the first time Schreiber suggested the possibility that the employees were not coming back was the Friday before the instant hearing. Those witnesses contend that it was only then that Schreiber told them that they should consider other gainful employment. Without addressing the issue of credibility, the fact remains that at no time were these employees led to believe that they would be returning to work for the Employer.

Employee Kevin McCartney has been off work since January 2006, recovering from an on-the-job injury. Within weeks of the instant proceeding, McCartney contacted the Employer to report that he would soon be released to return to work. McCartney was advised that there was no work available, though Schreiber hoped that there would be work by the time McCartney was released. When McCartney was released he again phoned Schreiber. Schreiber again said there was no work available and if McCartney had an opportunity he should take a position elsewhere.

No employees have been hired since the February 2006 layoff. Currently only two of the Employer's seven "core", employees are actively working – they are Ken Bernard and Stacy Perez. The other "core" employees were laid off within a few weeks of the instant proceeding and have not returned to work. The Employer hopes to secure sufficient work to actively employee its average 6-7 employee complement.

The Employer contends that there is not enough current work to keep the core employees working, let alone recall the employees laid off in February 2006.⁷

The Petitioner presented no evidence which would rebut record evidence regarding the normal employee complement, the Employer's past experience vis-à-vis sales or the fact that the

⁶ The layoff was effectuated well before the filing of the petition in this matter.

⁷ Schreiber testified that even assuming work became available, he would not recall Mr. Freda or Mr. Fulgenzi based on his dissatisfaction with certain aspects of their job performance. Because I find that neither employee has a reasonable expectancy of recall in any event, I will not address the issue further.

higher volume of business in 2005 was an anomaly. The Petitioner presented no evidence or testimony to rebut the Employer's evidence regarding the current state of its operations.

The Petitioner did present certain of the laid off employees, including Louis Nemeth, Tony Freda, Kevin McCartney and David Fulgenzi, to testify regarding what they were told at the time of layoff and thereafter, and as noted, *infra*, the testimony is not dispositive nor persuasive regarding the issue of whether these employees' have a reasonable expectancy of recall.⁸ The employees also testified to their layoff and/recall experiences, specifically that they have been laid off for two months or more and recalled. Without information as to the Employer's work volume at the time, that fact, standing alone is not persuasive. Moreover, as noted above, there is testimony that during previous layoffs employees were told that while there was no work, there was anticipated work.

Finally, the Petitioner's witnesses testified that they received a letter from the Employer as late as April 18, 2006. The letter was from Ken (Schreiber) and Tom (Dodge) and addressed to all employees. The letter was addressed to "All Employees" and the subject matter was the organizing drive involved in this matter. The Petitioner contends that document establishes that as of the date of the letter, the Employer continued to recognize the laid off individuals as employees. Ken Schreiber testified that the letter was sent to the laid off individuals in error. In any event, the letter is not dispositive of the issue.

Analysis

The parties have stipulated and I find that the Employer is engaged in electrical work in the construction industry. Considering the nature of this employing industry, specifically the fluctuations in employee complement, the Board has developed a formula for determining voter eligibility: The current state of the law in this area is found in **Daniel Construction Company, Inc., 133 NLRB 264 (1961)** and **Steiny and Company, 308 NLRB 1323 (1992)**, holding that

. . . in addition to those eligible to vote under the standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date.

The parties have stipulated that under this formula, the five employees at issue would be eligible to vote. However, the Employer argues that these same employees have been permanently laid off and have no expectancy of recall. Therefore, notwithstanding their eligibility under the formula, they would not be eligible to vote. The Employer bears the burden

⁸ Testimony was taken on the seniority of the laid off employees vs. the "core" employees. I note that the retained employees had more or as much seniority as the laid off employees with the exception of Mr. Fulgenzi. That being said, the Employer has no layoff policy and the Employer's selection of employees for layoff will not be addressed in this forum.

of establishing that the employees have no reasonable expectancy of recall. See **Laneco Construction Systems, Inc., 339 NLRB 1048 (2003).**

In **Apex Paper Box Company, 302 NLRB 67 (1991)**, the Board enumerated several factors to be considered in determining whether laid off employees are eligible to vote, including, “the employer’s past experience and future plans, the circumstances surrounding the layoff and what the employees were told about the likelihood of recall.”

The record evidence reveals that the Employer has no standard layoff/recall policy. While the Employer’s owner concedes that he tries to recall employees, this has not always been the case. There is unrebutted testimony that the Employer has laid off and not recalled certain employees. Employees in the “core” group have been laid off and recalled as have certain of the employees in issue here.

The Employer presented evidence that in 2005 it realized a higher than average volume of business which required increasing its employee complement. In early 2006, the majority of the work was completed and there was insufficient work to sustain the increased employee complement. On February 22, 2006, the Employer laid off Dave Fulgenzi, Tony Freda, Luis Nieves and Louis Nemeth. At the time of the layoff, the employees were advised that there was no work. None of the employees were advised with respect to the duration of the layoff. None of the employees were given reason to believe that there would be work available in the foreseeable future or otherwise. There is a dispute as to when the employees were told that they should consider other job opportunities.

With regard to the current state of the Employer’s operations, while there are outstanding bids, the unrebutted evidence and testimony is that the value of the bids totals an additional \$150,000 to \$200,000 of sales. There is no guarantee that the Employer will be awarded any single bid. The Employer witnesses’ unrebutted testimony reflect that even were it awarded the bids, the amount of sales would be insufficient to support more than its standard employee complement of six or seven employees.

Since the February 2006 layoff, no new employees have been hired. Of the five remaining electrical workers, only two are currently working, the others have been laid off. Tim Golding has been laid off. The Employer is hopeful that it will be awarded certain of its outstanding bids, which would permit the recall of these “core” employees.

Based on the testimony and record as a whole, I find that the employees laid off on February 22, 2006, including Tony Freda, Dave Fulgenzi, Luis Nieves, and Louis Nemeth have no reasonable expectation of recall and are not eligible to vote in the election. I make the same finding concerning Kevin McCartney who was laid off upon his release to return to work.

V. Conclusion

In sum, I have determined that the truckdriver/warehousemen classification should be appropriately included in the voting group. I have further determined that employees Dave

Fulgenzi, Tony Freda, Luis Nieves, Louis Nemeth and Kevin McCartney have no reasonable expectancy of recall and are ineligible for inclusion in the voting group.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Also ineligible to vote those employees who I have determined have no reasonable expectancy of recall, including, Dave Fulgenzi, Tony Freda, Luis Nieves, Louis Nemeth and Kevin McCartney.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **International Brotherhood of Electrical Workers Local No. 38.**

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969).** Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994).** The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by **June 5, 2006**.

Dated at Cleveland, Ohio **this 22nd** day of May 2006.

/s/ [Frederick J. Calatrello]

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8